Office-Supreme Court, U.S.
FILED
DEC 31 1965
JOHN F. DAVIS, CLERK

No. 345 //

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CANADA PACKERS, LIMITED, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FILED ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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Due: January 3, 1966

McCORMICK AND HENDERSON, INC., CHICAGO

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Responsive to the Court's invitation in its order of October 11, 1965, the Solicitor General has submitted a memorandum, as *amicus curiae,* setting forth the views of the United States. The memorandum includes a separate expression of views submitted on behalf of the Interstate Commerce Commission, in which the Commission joins the Solicitor General in urging the Court to grant the petition for a writ of certiorari. Petitioner, of course, is in full accord with these prayers. It is also in complete agreement with the discussion and arguments presented by the Commission in support of its position. The Commission's

views are essentially the same as those urged by petitioner in its plea for issuance of the writ. While concurring generally with the presentation of the Solicitor General, petitioner has serious reservations regarding his suggestion that the Court review existing tests as to the measure of damages and that it establish new criteria for gauging the liability of American railroads.

Full liability no deterrent to joint rates.

The Solicitor General states, at page 5 of the memorandum, the current rule of law governing the American lines' liability for reparations in cases like the present one:

> Accordingly, it has been the consistent view of the Commission and of this Court that, notwithstanding the territorial limitations of its jurisdiction, the Commission may determine whether a joint through international rate is unjust and unreasonable, and, if it finds that it is, award the shipper reparations representing his entire overcharge* under the rate. (Footnote added.)

The foregoing statement is a correct summation of the rulings of *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S. 179 (1927) and *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654 (1931). Although recognizing that the present case clearly falls within the ambit of these decisions, the Solicitor General is concerned that this rule will discourage American railroads from entering into joint through international rates to the inconvenience and disadvantage of shippers. He also indicates that it would be unfair to place the carrier in a position where its liability for full reparation may be dependent on circumstances beyond its and the Interstate Commerce Commission's control.

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* The word "overcharge" obviously is not used in its technical sense but to express the amount in excess of the rate found to be just and reasonable.

From the foregoing, the Solicitor General concludes that, in fairness, the American carrier must be permitted an opportunity to prove that the joint through international rate, found to be unjust and unreasonable by the Interstate Commerce Commission, is not unjust and unreasonable insofar as the American segment of the shipment is concerned. He would require the carrier to carry the burden of proving the amount of the just and reasonable charge for the American segment of the rate, and its damages would then be computed by subtracting that amount from the amount actually collected under its divisions agreement with the foreign line.

With all due respect to the Solicitor General, petitioner believes that his concern for the future of joint through international rates is unfounded. The principle established by the *News Syndicate* decision, which petitioner submits is controlling here, was announced in 1927, or almost forty years ago and reaffirmed in 1931 in the *Lewis* case. Yet the United States carriers have continued to this day to publish joint through international rates with foreign line connections. History alone strongly indicates that the American lines have not been deterred in making such rates. Further, the Interstate Commerce Commission does not share the concern of the Solicitor General as to the need to limit the liability of U.S. carriers under the theory that the filing of joint rates must be encouraged. As the Commission points out in its separate statement of views (page 15 of the Memorandum), only a handful of cases arise each year involving international rates, and "there is no indication from any quarter that the potential liability of U.S. carriers for the entire unlawfulness of joint rates discourages their publishing such rates."

The Solicitor General believes there is an element of unfairness in the present rule because under it American lines could be held fully liable for damages even where the

rate is unjust or unreasonable solely by actions or policies of foreign regulatory bodies or foreign carriers. Petitioner urges that this line of reasoning overlooks the fact that the American lines would not enter into joint through international rates if it were not to their advantage to do so. Their arrangements with their foreign counterparts are voluntary, contractual undertakings which they can, so far as this record discloses, negotiate and enter into or not as they see fit. Presumably, the American carriers could include in any joint rate agreement a requirement that the Canadian lines share in or otherwise reimburse the American railroads for a proportion of any reparations which the American lines may be called upon to pay for transportation within Canada. The U.S. railroads as contracting parties to joint rates, are in far better position to protect themselves and to control the level of the rates than is a shipper who is compelled to pay the result of the carriers' agreement when published in a rate tariff. If the shipper is aggrieved by the charge, its only remedy for damages is by action before the Commission while the carrier is in position to guard against contingencies in its contract with the foreign line.

This Court has rejected the divisions approach.

The concept of limited liability suggested by the memorandum is not entirely new. A similar contention was raised as to domestic traffic and rejected by this Court as unsound in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U.S. 217 (1925). The rates in question in that case were "strictly joint through rates" (page 233) which the Commission had held exceeded maximum reasonable rates by 35 cents per ton. Reparation was awarded on that basis. Louisville & Nashville contended that the reparation award was void as to it to the extent it exceeded 23 cents which

amount the railroad claimed was its share of the excessive charges, based on divisions with its connecting lines.

In rejecting that argument, the Court said at page 234:

> The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier.
>
> * * *
>
> The division of the joint rate among the participating carriers is a matter which in no way concerns the shipper. The shipper's only interest is that the joint rate be reasonable as a whole.

The argument advanced in that case is similar to the Solicitor General's suggestion that the American line, in the case of joint through international rates, should be held liable only for the amount that its division exceeds the American segment of the rate found just and reasonable. The Solicitor General's position incorrectly places emphasis on the damages to the carrier and does not recognize, as the Court found in the *Sloss-Sheffield* case, that the liability arises out of the wrongful exaction from the shipper—not out of the unjust enrichment by the carrier.

Petitioner entitled to full recovery under any test.

Assuming for the purposes of argument that the Solicitor General's suggestion is sound, respondents herein then have the obligation of showing that the American segments of the New Mexico to Canada rates were just and reasonable and of also showing the divisions which they received for that portion of the transportation. But there is nothing in the record before the Commission on the matter of divisions or on the American segments of the rates. Thus respondents have failed to sustain their burden of proof. In that circumstance and consistent with the Solicitor Gen-

eral's view the general rule of liability must apply and petitioner would be entitled to full reparation.

While petitioner believes it is entitled to full recovery under the tests advocated by the Solicitor General, it very strongly urges that the position of the Interstate Commerce Commission is a sounder approach to the proper disposition of this case. Petitioner agrees with the Commission that "... the petition should be granted and the decision below reversed on the narrow grounds that the respondent railroads were fully liable for all unlawfulness in the joint international rates charged the petitioning shipper."

This case, petitioner submits, falls squarely within the Court's decisions in *News Syndicate* and *Lewis*, and there is no occasion, under the circumstances here present, to pass upon the alternative measure of damages suggested by the Solicitor General.

Respectfully submitted,

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Due: January 3, 1966